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No. 99-312

In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF KENNETH W. HEATHINGTON, PH.D., P.E., GARY LONG, PH.D., P.E. AND HOWARD L. ANDERSON IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Amici are Transportation Engineers with an interest in railroad grade crossing safety. They are familiar with the practice of transportation engineering as it relates to grade crossing safety and have studied the technical materials available. They are well aware of the great risk of serious injury or death when the collisions occur between trains and motor vehicles. They are aware of the methods available to reduce this risk of serious injury or death. They are also aware of the limitations of some of those devices.

Kenneth W. Heathington, Ph.D., P.E. is a transportation engineer with a Ph.D. from Northwestern University in Civil Engineering (Transportation Planning) and a registered professional engineer. He was a professor of civil engineering emphasizing transportation planning at The University of Tennessee from 1972 until his retirement in 1992. He acted as president and also served as a member of the board of directors of The University of Tennessee Research Corporation. While with the University he oversaw research projects for the U.S. Department of Transportation, Federal Highway Administration including, "Innovative Railroad-Highway Crossing Active Warning Devices" and an "In Depth Accident Investigation". He has authored over one hundred-fifty papers dealing with transportation issues a substantial number of which dealt specifically with railroad/highway grade crossing safety. He is now a private consultant. A complete copy of Dr. Heathington's CV is attached to the affidavit he has filed in this case.

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[1] Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici and their counsel made any monetary contribution to the preparation or submission of this brief. The letters granting this consent is attached as exhibit to this brief.

Gary Long, Ph.D., P.E. is a transportation engineer with a Ph.D. in transportation engineering from Texas A & M University and a registered professional engineer. He has been a professor of civil engineering at the University of Florida since 1977 and has been the Transportation Coordinator for the Department of Civil Engineering. He has served as the Special Advisor to the Assistant Secretary of the Florida Department of Transportation. He has received the Technical Council Award and Certificate of Accomplishment for Outstanding Service from the Institute of Transportation Engineers and the Past Presidents' Award from the Institute of Traffic Engineers. He is the author of over 50 technical publications and has made numerous presentations concerning Transportation Engineering. He has been invited to testify before the NTSB on railroad grade crossing safety, and is currently the principal investigator on a research project sponsored by the Florida DOT on Track Clearance Time Requirements at Railroad-Preempted Traffic Signals.

Howard L. Anderson, has a B.S. in Civil Engineering from the University of California at Berkeley. He was with the Federal Highway Administration from 1954 until his retirement. He has made numerous presentations regarding transportation engineering generally and railroad grade crossing specifically. He was largely responsible for making federal funding available in 1970 and 1980 to bring railroad grade crossings into minimum compliance with the MUTCD. For his work he received the Superior Achievement Award from the FHWA and the Distinguished Service Award for Safety from the National Safety Council.

SUMMARY OF THE ARGUMENT

When federal preemption is used as a defense to a tort action, the desired effect is immunity from liability. It means immunity regardless of the egregiousness of the

tortfeasor's conduct or the magnitude of the harm. Common law tort liability is an important part of our jurisprudence. It provides a vehicle for accountability and responsibility that has existed in civilized society, in one form or another, for millennia. It addresses preventable events and assigns responsibility. Potential liability in tort provides a strong incentive to prevent the occurrence of the harm. Not infrequently, one reason for imposing liability is the deliberate purpose of providing that incentive.

The mere expenditure of federal funds, by itself, cannot abrogate over a century of common law. It is one thing to find preemption of state common law rights when the federal government "mandates" that particular warning devices be in place prior to opening a grade crossing to motorists. It defies common sense and the clear presumption against preemption to destroy an otherwise valid common law negligence claim simply based on the expenditure of federal funds.

The two-part test for preemption in grade crossing cases should require the party claiming it to: **(1)** establish whether subsection (b)(3) or (4) of 23 C.F.R. § 646.214 applies at all (i.e., whether federal funding participated in the installation of warning devices at the crossing in question); and **(2)** establish whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4). In other words, a court must first establish that (b)(3) and (b)(4) are applicable, and then establish that either (b)(3) or (b)(4) was, in fact, applied.

If the railroad's common law duty is removed before there is a determination concerning the adequacy of the protection at a given crossing **and** before the proper protective devices are in place, **who will be responsible for safety at the crossing?**

We have known for most of the last 70 years that the most effective method of warning motorists of the approach of a train is through active signals at the crossing. We have known for years that train whistles and headlights are not effective warning devices. A train going only 20 miles per hour takes over a quarter of a mile to stop. A train going 60 miles per hour takes almost two **miles** to stop! When the train's engineer tries to make an emergency stop, 5 to 15 seconds will elapse before the brakes become effective. Motorists in automobile/train collisions are 40 times more likely to be seriously injured or killed than they would be in a collision with a motor vehicle. For the last 35 years, every study conducted concerning the death and human tragedy suffered at railroad crossings has consistently shown that the presence of active warning devices significantly reduces the rate of serious injury or death at those crossings.

ARGUMENT

I. THE IMPACT OF FEDERAL PREEMPTION ON VALID COMMON LAW ACTIONS FOR NEGLIGENCE.

When federal preemption is used as a defense to a tort action, the desired effect is immunity from liability. It means immunity regardless of the egregiousness of the tortfeasor's conduct or the magnitude of the harm. We cannot lose sight of the fact that the practical effect of finding a state common law negligence claim preempted by federal law is to excuse a wrongdoer from accountability for its actions.

Common law tort liability is an important part of our jurisprudence. It provides a vehicle for accountability and responsibility that has existed in civilized society, in one form or another, for millennia. It addresses preventable events and assigns responsibility based on both the magnitude of the loss and the tortfeasor's ability to prevent it.

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.[2]

Norfolk Southern's position here is little different from Medtronic's in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

> Under Medtronic's view of the statute, Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device. Moreover, because there is no explicit private cause of action against manufacturers contained in the MDA, and no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective medical devices. n7 Medtronic's construction of § 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation in order "to provide for the safety and effectiveness of medical devices intended for human use," 90 Stat. 539 (preamble to Act). It is, to say the least, **"difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct,"**

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[2] Prosser and Keeton, *The Law of Torts, Fifth Edition*, West Publishing (1984)

> *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984), and it would take language much plainer than the text of § 360k to convince us that Congress intended that result.[3] (Emphasis supplied)

The position advocated by Norfolk Southern and its amici is that immunity from responsibility should occur any time there is any federal action in a given area. They seek an abolition of more than 100 years of common law concerning railroad grade crossing safety and this Court's long standing presumption against preemption. This is incorrect and constitutionally impermissible.

> Here, however, Medtronic's sweeping interpretation of the statute would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the Lohrs' alleged injuries.[4]

Neither CSX's defense in *Easterwood* nor Norfolk Southern's defense in this case was predicated on their conduct or on the conduct of each respective plaintiff. Each contended that over a century of common law should be erased because the federal government decided to use federal tax dollars to deal with a problem the railroad failed to address, grade crossing safety. The fact that FHWA chose to exercise good stewardship of the taxpayers' money and develop a rational plan to analyze the hazard level of individual crossings should not be available to excuse a tortfeasor from responsibility for the harm it caused.

II. THE ISSUE.

When this Court decided *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 123 L. Ed. 2d 389, 113 S. Ct. 1732

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[3] *Lohr*, 518 U.S. 487, 116 S. Ct. at 2251.

[4] *Id.* 518 U.S. 488-89, 116 S. Ct. at 2252.

(1993), it made it quite clear that the **only** source for federal preemption of common law claims concerning the adequacy of the protection at a railroad grade crossing was 23 C.F.R. §§ 646.214(b)(3) and (4).

> The remaining potential sources of preemption are the provisions of 23 CFR Sections 646.214(b)(3) and (4), which unlike the foregoing provisions, do establish **requirements** as to the installation of **particular** warning devices.
>
> * * *
>
> As discussed supra, at 666-667, under §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds "participate in the installation of the [warning] devices." Thus, unlike the Manual, §§ 646.214(b)(3) and (4) displace state and private decision-making authority by establishing a federal-law requirement that **certain protective devices be installed or federal approval obtained**. (Emphasis supplied)[5]

This is consistent with this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) finding preemption of common law failure to warn claims where Congress " . . . prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels or in cigarette advertisements." Where the federal government "mandates" that particular warning devices be in place prior to opening a grade crossing to motorists, state common law cannot find fault for failing to use something else.

The dispute is centered on the following conclusion to this section of the Court's opinion:

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[5] 123 L. Ed. at 400, 113 S. Ct. at 1741.

> In short, for projects in which **federal funds participate** in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings. 113 S. Ct. at 1741.

The railroads, however, have taken the phrase "federal funds participate" and stretched it beyond its logic and context. Since *Easterwood*, the railroads have argued, as Norfolk Southern does in this case, that the only question to be asked and answered in a railroad crossing case is whether "federal funds participated" in any crossing improvement, and they argue that if the answer to that question is answered in the affirmative, federal preemption applies. The railroads have argued, as the Norfolk Southern argues herein, that federal preemption applies regardless of whether or not a crossing has 23 C.F.R. § 646.214(b)(3) characteristics and regardless of whether the crossing ever had an engineering evaluation to determine whether any particular crossing protection device was adequate for the risks of that particular crossing.

This argument ignores the history of legislation and regulations designed to improve railroad-crossing safety. It ignores the fact that during the 1970's and 1980's two different programs, administered by the FHWA, addressed the deficiencies known to exist at grade crossings. In addition to federal funds earmarked for installing flashing lights and gates at crossings where specific engineering evaluations had concluded that such devices were necessary, the 1973 Federal-Aid Highway Act, section 203 provided the funding and encouragement to identify crossings which had no passive devices, such as

crossbucks, or had passive devices which did not conform with uniform national standards. The intent of section 203 was to bring all crossings in the country up to minimum protection levels, which meant that all crossings should have passive signs and markings which complied with the national standards of the *Manual on Uniform Traffic Control Devices* (MUTCD) regardless of site-specific conditions. This program did not require an engineering evaluation of each crossing, nor did it require a determination of whether a particular type of crossing protection device was adequate for the specific risks at the individual crossing, even though federal funds may have been used to assist the states in bringing certain crossings up to these minimum levels of protection. It is difficult, if not impossible, to find a public crossing in the United States that did not receive at least one dollar of federal funding under this minimum protection program. Accepting the railroad's simplistic interpretation of the language of the *Easterwood* case, their "bright line" becomes nothing more than a dark cloud behind which hides its attempt to gain total immunity for every crossing fatality that occurs in this country.

When the phrase "federal funds participate" in the installation of warning devices is made in the context of 23 C.F.R. §§ 646.214(b)(3) and (4), it makes sense. The regulation provided that where federal funds participate in a crossing *meeting the criteria of the regulation*, flashing lights and gates would be required, unless something less was specifically approved at a particular crossing. Just as an engineering analysis is necessary to determine that flashing lights and gates are required at a specific crossing under 646.214, so should an analysis be required that they are not. To think or argue to the contrary is to ignore sound principles of engineering and traffic safety. The unassailable fact remains that passive devices, such as crossbucks or pavement markers, are not necessarily adequate to protect the public from the risks of all railroad

crossings regardless of who has contributed to their installation. Adequacy can only be determined by an engineering analysis and evaluation of the site-specific conditions at each crossing. The minimum protection afforded by a crossbuck or pavement marker has never been considered under any traffic or engineering principle to be adequate protection without such an analysis. The Norfolk Southern, and their amici, however, wish this Court to ignore these fundamental principles.

It is the dispute over the interpretation of the *Easterwood* opinion with a myriad of decisions both in the federal and state courts that led this Court to grant certiorari in this case.

III. THE SIXTH CIRCUIT'S DECISION IN *SHANKLIN* IS CONSISTENT WITH *EASTERWOOD* AND THE STRONG PRESUMPTION AGAINST PREEMPTION.

The opinions of Judge Batchelder in *Shanklin*[6] and Judge Posner in *Shots*[7] represent the better-reasoned analysis of this Court's decision in *Easterwood*, as well as its historical reticence to preempt state common law.

A. The Two-Part Test to Finding Preemption in Railroad Grade Crossing Cases.

Judge Batchelder correctly observes that the major difference between Judge Posner's examination of *Easterwood* and courts with a contrary view was that others found the mere fact of "federal funding" was sufficient to find preemption:

> The Fifth, Eighth, and Tenth Circuits have each interpreted Easterwood to hold that federal

[6] *Shanklin v. Norfolk Southern Railroad Company*, 173 F.3d 386 (6th Cir. 1999)

[7] *Shots v. CSX Transp.*, 38 F.3d 304 (7th Cir. 1994)

> funding is both a necessary and a sufficient condition for the preemption of state law.
>
> * * *
>
> The Shots Court framed the discussion by first asking "what if anything more must be shown besides federal financial assistance to knock out a state common law or statutory safety requirement for grade crossings . . . ." *Id.* at 305. Judge Posner, writing for the Seventh Circuit in Shots, found it significant that the Easterwood Court never got around to enumerating additional requirements for preemption, because the threshold requirement, federal funding, was absent in that case. *Id.* at 307. **Judge Posner correctly noted that there is a difference between holding that federal funding is a necessary condition to preemption and holding that federal funding is a sufficient condition.** *Id.*[8] (Emphasis supplied)

Judge Batchelder and the Sixth Circuit concluded that Judge Posner's analysis was the correct one. Clearly, preemption could occur under 23 C.F.R. §§ 646.214(b)(3) and (4) because that regulation, when it came into play, mandated the use of certain devices. The fact of federal funding is significant in the context of this regulation, because **before** federal funds could be approved on a project funded under this regulation, lights and gates had to be **installed and working.**

> (2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by

[8] 173 F.3d at 391

> FHWA until adequate warning devices for the crossing are installed and functioning properly. 23 C.F.R. § 646.214(b)(2)

Conversely, if something **less** than lights and gates could be used, there had to be a finding that something less was adequate. This Court never had occasion to address the steps necessary to find preemption under 23 C.F.R. §§ 646.214(b)(3) and (4) in *Easterwood* because the crossing at issue in that case did not make it past the first step, which was federal funding.

> Because the Supreme Court in Easterwood found that federal funds had not participated in the project at issue in that case, it had no occasion to consider the application of the regulation to particular crossings.[9]

The Sixth Circuit used Judge Posner's analysis to formulate a two-part test for finding preemption pursuant to 646.214(b)(3) and (4). That test is consistent with *Easterwood,* and the clear presumption against preemption:

> Thus, the Seventh Circuit in Shots announced a two-part test for preemption in grade crossing cases: **(1)** establish whether subsection (b)(3) or (4) applies at all (i.e., whether federal funding participated in the installation of warning devices at the crossing in question); and **(2)** establish whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4). In other words, a court must first establish that (b)(3) and (b)(4) are applicable, and then establish that either (b)(3) or (b)(4) was, in fact, applied.[10] (Emphasis supplied)

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[9] 173 F.3d at 392 citing *Shots*, 38 F.3d at 307

[10] 173 F.3d at 393

B. The "Fiction of Constructive Approval" is Contrary to the Presumption Against Preemption.

Judge Batchelder describes preemption based solely on proof that federal funds participated in the project as the "fiction of constructive approval." Again, she has gone directly to the heart of the difference between the analysis of the Sixth and Seventh Circuit, and that utilized by the courts holding " . . . that federal funding is the equivalent of a determination that the devices being funded are adequate protection at a particular crossing."[11]

> To characterize the happenstance method by which FHWA funds were approved for the [safety measures in question] as an act which triggered preemption is to ignore, it seems, the whole point of the Easterwood doctrine . . . It makes no sense to find that the railroad has been excused from its common law duty to maintain safe crossings simply because, without any analysis by anyone regarding what devices were required at [the particular crossing] under the federal regulatory scheme, FHWA signed off on a request for funds, a portion of which came to be applied to defray the cost to the county of installing these [safety measures].[12]

Any other conclusion defies common sense and this Court's instruction regarding federal preemption. The criteria laid out by this Court in *Lohr* require that any preemption analysis concerning valid common law claims starts with two basic assumptions:

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-

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[11] 173 F.3d at 393

[12] *Id.*

empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Ibid.; *Hillsborough Cty.*, 471 U.S. at 715-716; cf. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987). Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the scope of its intended invalidation of state law, see *Cipollone*, 505 U.S. at 545-546 (SCALIA, J., concurring in judgment in part and dissenting in part), we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. *Id.*, at 518, 523. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.

Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 11 L. Ed. 2d 179, 84 S. Ct. 219 (1963), that "the purpose of Congress is the ultimate touch-stone" in every pre-emption case. See, e. g., *Cipollone*, 505 U.S. at 516; *Gade*, 505 U.S. at 96; *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 55 L. Ed. 2d 443, 98 S. Ct. 1185 (1978). As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of congressional

> purpose." *Cipollone*, 505 U.S. at 530, n. 27 (opinion of STEVENS, J.). Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. *Gade*, 505 U.S. at 111 (KENNEDY, J., concurring in part and concurring in judgment). Also relevant, however, is the "structure and purpose of the statute as a whole," *id.*, at 98 (opinion of O'CONNOR, J.), as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.[13]

Despite the fact that Judge Batchelder had clearly demonstrated that Judge Posner's decision was the better-reasoned interpretation of *Easterwood*, she did not end her analysis at that point. She carefully harmonized her decision and Judge Posner's decision with the clear, pronounced rules regarding the heavy burden of preemption.

> According to the Supreme Court, preemption analysis must "start with the assumption that the historic police powers of the States [were] not to be superseded by [the] Federal Act unless that [was] the clear and manifest purpose of Congress.". The doctrines of federalism and judicial restraint both counsel courts against lightly casting aside the "basic assumption that Congress did not intend to displace state tort law." Moreover, "the regulation of health and safety matters is, primarily and historically, a matter of local concern." Thus, the presumption against federal preemption of state law is "particularly apt" in the area of railroad safety. Indeed, the Easterwood Court, itself, noted "the

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[13] *Lohr*, 518 U.S. at 485, 116 S. Ct. at 2259

> relatively stringent standard set by the language of [the FRSA's preemption clause] and the presumption against pre-emption . . . "[14]

This is clearly consistent with this Court's charge in *Cipollone, Lohr* and in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984). Judge Batchelder also recognized that the presumption against preemption became even stronger where application of the doctrine would deny people with legitimate claims a remedy. *Id.*

If the railroad's common law duty is removed before there is a determination concerning the adequacy of the protection at a given crossing **and** before the proper protective devices were in place, **who will be responsible for safety at the crossing?**

> . . . interpreting Easterwood too broadly (i.e., finding preemption prematurely) will remove responsibility from the railroads before the federal government has stepped in. In that case, no one is responsible for the safety of the motorists who use the crossing; we find in the FRSA no clear intent to achieve such an effect.[15]

* * *

As evidenced by the Amicus Brief filed by the American Association of Railroads ("AAR"), immunity from state tort actions is no small prize. Under the narrow approach announced by the Seventh Circuit, railroads receive that prize only if they have, in fact, taken the desired action. Under the expansive approach, however, railroads get the prize whether or not they have taken the desired action. **It takes nothing more than a rudimentary understanding of economics to see that an incentive-based system**

[14] 173 F.3d at 394, Citations omitted

[15] 173 F.3d at 394

> **does not work unless the reward is somehow tied to performance of the desired action.**[16] (Emphasis supplied)

Judge Posner's language is much stronger than the Sixth Circuit's language, but is nonetheless accurate:

> Indeed, it would have been an **extraordinary act of irresponsibility** for the Secretary of Transportation, by approving the agreement, **to preclude tort liability** for the railroad's failing to have active warnings at any of the thousands of crossings covered by the agreement, or otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings, when no one in the federal government had made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal standards. (Emphasis supplied)[17]

This, also, is consistent with the views of this Court expressed in *Easterwood*.

> In fact, the scheme of negligence **liability** could just as easily **complement** these **regulations** by encouraging **railroads** – the entities arguably most **familiar** with **crossing conditions** – to provide current and complete information to the state agency responsible for determining priorities for improvement projects in accordance with § 924.9.[18]

[16] 173 F.3d at 395

[17] 173 F.3d at 393, 394

[18] 123 L. Ed. at 399, 113 S. Ct. at 1739.

C. The Sixth Circuit Chose NOT to Sacrifice Justice on the Altar of Judicial Economy.

Judge Batchelder was well aware that using "federal funding" as the "bright line test" for preemption simplified a court's job considerably.[19] Fortunately Judge Batchelder does not sacrifice justice at the altar of "judicial economy." Judge Batchelder addressed the issue from every possible angle. She analyzed *Easterwood*, the regulations that triggered preemption, the other cases addressing her issue and strong presumption against federal preemption. Most important, she never lost sight of the most important purpose of tort law, namely, to encourage safe conduct.

IV. THE NEED FOR ADEQUATE PROTECTION AT RAILROAD/HIGHWAY GRADE CROSSINGS.

It is well settled in the common law that railroads must exercise reasonable care to avoid collisions between their trains and automobiles at their grade crossings, yet safety still remains an issue at railroad-highway grade crossings throughout the United States. Over 100 years ago this court addressed essentially these same issues in *Grand Trunk Railway Company v. Ives*, 144 U.S. 408, 12 S. Ct. 679, 36 L. Ed. 485 (1892).

That case involved limited sight distance at a grade crossing. Two people were killed because they were not adequately warned of the approach of the train. *Id.* 144 U.S. at 410. One issue was whether the railroad had a duty to do something more than blow its whistle or sound its bell (there was evidence it did neither). The railroad argued that contentions that it should have done more to warn were barred because "the whole subject of signals, flagmen, gates, etc., at crossings . . . is regulated by statute." *Id.* 144 U.S. at 422. The trial court had

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[19] 173 F.3d at 395

instructed the jury that, under certain circumstances, " . . . reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury . . . : *Id.* at 420. This Court's advice then reflects a common sense approach to grade crossing safety that is applicable today, " . . . the fact that a statute provides certain precautions will not relieve a railroad company from adopting such other measures as safety and common prudence dictate." *Id.* Here, ample proof was presented that grade crossing safety required something more than the minimum.

The potential impact of a finding of preemption in this case on grade crossing safety is chilling. If preemption is granted here, and with the preemptions already granted in speed and other things, the railroads can travel 110 miles per hour over a class six track carrying 100 or more loads of hazardous materials, nuclear war heads and anything else that is dangerous, kill 1,000 or more people per day without a county (or parish), city or state doing anything about it.[20]

Even with the spending of about four billion dollars of public moneys over the past 25 years at grade crossings, the fatalities have not been significantly reduced in the last decade. This is due to several factors. The speed of trains has more than doubled in some locations with almost all locations having a significant increase in train speed. In addition, the volume of train traffic has increased substantially over many crossings. All of this has occurred over some crossings that do not meet even minimum standards for design and traffic control devices in the engineering field. *Id.* paragraphs 2 and 3.

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[20] Affidavit of K. W. Heathington, Ph.D., P.E., paragraph 5. Dr. Heathington's affidavit was filed with the Court.

A. The Hazard of Railroad Grade Crossings.

It requires little sophistication to identify the hazard and the risk at a grade crossing. If a vehicle and a train meet at a grade crossing, the potential for serious injury or death is almost absolute. It is generally accepted that **motorists** in an automobile/train collision are **40 times** more likely to be **seriously injured** or killed than they would be in a collision with another motor vehicle.[21] When we look at the simple physics of an automobile/train collision, the reason is clear.

A train with two engines and 30 cars weighs 3,700 tons. That is a tremendous mass to be pitted against an automobile that weighs between two to three tons. A train striking an automobile is similar to a car running over a soft drink can.[22]

If we compare the momentum of a 3,700 ton train, going only 25 miles per hour, to that of a 40 ton tractor trailer truck, the truck would have to be traveling at a speed of **2,312 miles per hour to achieve the same momentum!** If that same train is traveling 60 miles per hour, our truck would have to increase its speed to **5,550 miles per hour!** *Id.* If we add to the equation the fact that the train traveling 25 miles per hour takes over a quarter of a mile to stop and that the truck traveling 60 miles per hour takes almost **two miles to stop,**[23] it does not take much engineering sophistication to recognize the magnitude of the potential for tragedy.

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[21] "Full Speed Ahead With Railroad Safety," *Safety and Health* January 1991, page 28.

[22] Dr. Heathington Affidavit, paragraph 14.

[23] "Full Speed Ahead With Railroad Safety," page 28.

B. Eliminating or Minimizing the Hazard of Railroads at Grade Crossings.

Clearly, the best way to deal with hazards at a grade crossing is to eliminate the crossing but that is not always practical or feasible.

> Desirably, all railroad crossings should be separated on the rural arterial system. Practical aspects of the problem, however, require that many crossings will be at grade. Crossings can be treated in various ways, including adequate signing, signals, signals with gates, and finally separations. Judgment must be used in the selection process, which will involve the amount and speed of traffic on both the roadway and the railroad and the available sight distance, and safety benefits. The tendency must always be to attempt to **provide** the **best protection possible**.[24] (Emphasis supplied)

Where there must be a crossing of a railroad track and the roadway, there must also be adequate warning devices. In areas where motorists can see for miles in either direction "adequate" protection may simply be cross bucks. Conversely, in any situation where the motorists' view of the oncoming train is limited, flashing lights and/or flashing lights and gates may mean the difference between life or death.

We have known for years that train whistles and headlights are not effective warning devices. *The Visibility and Audibility of Trains Approaching Rail-Highway Grade Crossings* Report FRA-RP-71-1, May 1971. Three primary factors interact to assure that a warning signal is audible to a motorist. These factors are, the sound level of the warning device, the sound treatment of the vehicle shell and the operating noise inside the vehicle. The sound

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[24] AASHTO – *Geometric Design of Highways and Streets*, p. 522

must penetrate the shell of the vehicle at a sound level capable of overriding the existing operating noise inside the vehicle.[25]

Trains can have horns which meet or exceed published standards; however, in the real world, they provide a warning deemed adequate by the Aurelius study when the train is only one to two seconds away from the crossing. *Id.* Motor vehicles are **more** "sound proof" today than they were at the time the above study was conducted, yet the horn on the train has remained essentially unchanged since 1971. *Id.*

No one suggests that trains should operate without lights or that they not sound their horns as they approach grade crossings; however, it is quite clear that they are not to be relied on as warning devices when we know that death or serious injury results if the warning fails.

1. The Use of Gates and Flashing Lights Significantly Reduces the Risk of Serious Injury or Death.

Section 646.214 requires those grade crossings meeting its stated criteria include automatic gates with flashing lights. Studies conducted concerning the effectiveness of flashing lights and gates confirm what simple common sense tells us . . . there is an **80% to 89% reduction** in the rate of **serious injury** and **death** when crossings are upgraded from cross bucks to lights and gates.

Morrissey, J., *The Effectiveness of Flashing Lights and Flashing Lights with Gates in Reducing Accident Frequency at Public Rail-Highway Crossings, 1975-1978*, U.S. Department of Transportation, Transportation System Center, Cambridge, Massachusetts, April, 1980, NTIS PB-81-133886 is a study that analyzes the effectiveness of traffic control

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[25] Affidavit of David M. Lipscomb, Ph.D., paragraph 5, filed with the Court.

devices at 2,994 railroad-highway grade crossings for the years 1975 to 1978. The study was conducted for the Federal Railroad Administration of the U.S. Department of Transportation. That study demonstrated that when upgrading from passive warnings (cross bucks) to gates with flashing light signals, there was an 84% expected reduction in accidents. The results of the D.O.T. study were consistent with the rates found in a similar study conducted earlier in California.[26]

2. The Reduction in the Rate of Serious Injury and Death When Crossings are Upgraded from Flashing Lights Only to Flashing Lights and Gates.

The importance of a physical guard or separation from the tracks can be seen when using the same two studies to assess the impact of the addition of gates to crossings which previously had only flashing lights as the warning device. These studies demonstrated that on the average there is a 61% reduction in accidents when gates with flashing light signals are used instead of flashing light signals only.

C. Cross Bucks are Not an Adequate Warning.

In reality, a cross buck is not a true warning device. There is a significant difference between a warning of a hazardous condition (for example, "high voltage") and a railroad cross buck. All a cross buck tells a motorist is that he or she is about to cross a set of railroad tracks. There is no risk of serious injury or death if no train approaches. Flashing lights, on the other hand, warn of

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[26] *The Effectiveness of Automatic Protection in Reducing Accident Frequency and Severity at Public Grade Crossings in California*, California Public Utilities Commission, Railroad Operations and Safety Branch, Traffic Engineering Section, August, 1975, NTIS PB-254-799.

the imminent approach of a train. The same studies cited above found that an upgrade from passive to flashing light signals will result in an expected 65% effectiveness in the reduction of accidents.

D. Determining the Adequacy of Traffic Control Devices.

There have been clearly-defined procedures for evaluation of the level of protection appropriate for given crossings promulgated by the FHWA for at least 25 years. These procedures were first published in the 1978 *Railroad-Highway Grade Crossing Handbook*. There were office memorandums from FHWA outlining these procedures prior to the publication of the handbook.[27] These same procedures have been given in the publications of the American Association of State Highway and Transportation Official's (AASHTO).[28] These procedures are used to determine whether a crossing should be made active instead of remaining passive and, if it is to be made active, whether flashing light signals or gates with flashing light signals should be used.

> Some of the considerations for evaluating the need for active warning devices at a grade crossing include the type of highway, volume of vehicular traffic, volume of railroad traffic, maximum speed of the railroad trains, permissible speed of vehicular traffic, the volume of pedestrian traffic, accident record, sight distance and the geometrics of the crossing.[29]

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[27] Dr. Heathington's Affidavit, paragraph 21.

[28] *A Policy on Geometric Design of Highways and Streets*, American Association of State Highway and Transportation Officials, 1990.

[29] *Id.*, p. 843.

The similar criteria are found in 23 U.S.C. § 614 for determining whether a crossing has adequate traffic control devices. The crossing characteristics which FHWA proposes to use in determining the need for traffic control devices at a crossing are: (1) Volume of vehicular traffic, (2) Volume of railroad traffic, (3) Maximum speed of railroad trains, (4) Permissible maximum speed of vehicular traffic, (5) Volume of pedestrian traffic, (6) Accident record, (7) Reduced sight distances, and (8) Potential for complete elimination of grade crossing without active traffic control devices provides an engineer with the basis for determining whether a crossing should be made active.

If the engineering decision is to make the crossing active, then the characteristics such as (1) Multiple mainline railroad tracks (2) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing, (3) High speed train operation combined with limited sight distance at either single or multiple track crossings, (4) A combination of high speeds and moderately high volumes of highway and railroad passenger or freight traffic, (5) High speed passenger trains, substantial number of school buses or trucks carrying hazardous materials, or continuing accident occurrences, (6) Recommendations of a multi disciplinary diagnostic inspection team, and (7) Any combination of the conditions listed above, provide the engineer with the information as to whether gates with flashing light signals should be installed.

The installation of passive traffic control devices required in the MUTCD for crossings does not require an engineering analysis. The specifications are already determined for passive devices, and an engineering analysis is needed only for an evaluation of the need to upgrade a crossing. The above procedures when used by the FHWA to determine if something more than passive protection is

required is, in fact, an engineering analysis. This analysis may or may not conclude that flashing lights and gates are needed, but in any event the conclusion is based upon an analysis of site-specific conditions. There was no engineering analysis performed here. There was no determination made by a diagnostic team or anyone else that mere cross bucks were adequate protection for Mr. Shanklin.

V. THE FEDERAL RAILROAD SAFETY ACT'S EXPRESS PREEMPTION CLAUSE EXCLUDES GRADE CROSSING SAFETY.

Where Congress has specifically considered the issue of preemption with an express preemption clause, that clause defines the regulations preemptive effect.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of expressio unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[30]

Common law negligence actions concerning the adequacy of the level of protection at some railroad grade crossings fit within the enumerated exceptions to preemption in the preemption clause of the Federal Railway Safety Act (FRSA). That provision provides:

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[30] *Cipollone*, ___ U.S. at ___, 112 S. Ct. at 2617

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> (1) is necessary to **eliminate or reduce an essentially local safety hazard**;
>
> (2) is **not incompatible** with a law, regulation, or order of the United States Government; and
>
> (3) does **not unreasonably burden** interstate commerce.

49 U.S.C. § 20106.

The basic essence of grade crossing safety is "local". It is not local to the state, county or city in which the crossing is located, but it is "local" to the crossing itself. The level of protection necessary to insure crossing safety is determined by the geometry of the crossing, the speed of the trains and vehicles using the track and roadway, the train and vehicle traffic and the type vehicles using that crossing.[31] These factors differ from crossing to crossing and are subject to change over time. The very manual used by the government and others to access crossing safety, the *Railroad-Highway Grade Crossing Handbook*, specifically states:

> The procedures for evaluating railroad-highway grade crossings are generally based upon the

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[31] *Railroad-Highway Grade Crossing Handbook*, U.S. Department of Transportation, Federal Highway Administration, 1986

> physical and operational characteristics of **individual** crossings.[32] (Emphasis supplied.)

A critical factor in collisions at passive crossings is limited sight distances. It was **the** factor for Mr. Shanklin.

> Sight distance is an important consideration at railroad grade crossings. There must be sufficient sight distance on the road for the driver to recognize the crossing, perceive the warning device as well as the train, and stop if necessary.[33]

In many instances neither the motorist nor the engineer can see the other before it is too late. The "visibility triangle" is critical and is part of the routine analysis of each individual crossing. The problem is unique to each crossing.

As this Court noted in *Easterwood*, the railroad is the one entity that is in the best position to be aware that a dangerous condition exists at a crossing. Its trains pass through each crossing on a daily basis. Its maintenance crews pass through on a weekly or monthly basis. Important aspects of crossing safety can and do change. The railroad is the entity most likely to become aware of that change. This, again, is specifically addressed in the *Railroad-Highway Grade Crossing Handbook*:

> The approach sight triangle is the second area that should be kept free from obstructions. This area provides approaching motorists with a view of an approaching train. It can encompass a rather large area that is usually privately owned. In rural areas this sight triangle may contain crops or other farm equipment that

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[32] *Id.* at p. 85

[33] AASHTO – *Geometric Design of Highways and Streets*, p. 432

> block the motorists' view. For this reason clearing the sight triangle can be difficult to achieve.[34]

For these reasons, the safety of a particular crossing can change from day to day, month to month or year to year. Regulatory activity is not well suited to deal with these issues; however, common law negligence is. Mrs. Shanklin's case takes a snapshot in time; analyzing the factors as they existed at the time of the event. It systematically determines the parties' duties to each other, their actions, the conditions under which the event occurred and what each party could have reasonably done, exercising reasonable care, to prevent the tragedy from occurring. The system is not perfect, but neither is a regulatory scheme that allows months and years to go by before addressing a known hazard. Both are important where issues of public safety are concerned.

Any safety regulation that is incompatible with a party's duty to exercise reasonable care must be circumspect. Safety must come first. Common sense dictates that no regulation should be in conflict with actions necessary to reduce or eliminate the risk of serious injury or death. In common law negligence claims, the parties look to the same publications to assess grade crossing safety that the diagnostic team would use. The issue in this case was sight distance; Mr. Shanklin's ability to see the train. Plaintiff's exhibit 23 is the sight distance triangle from the *Railroad-Highway Grade Crossing Handbook*.

Common law negligence existed harmoniously with the regulation of the railroad by states and the federal government before the passage of the FRSA. There is nothing in a plan that provides a rational method of allocating tax dollars that is at cross purposes with common law requirements to exercise reasonable care. The potential of a common law negligence claim is intended

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[34] *Id.* at pp. 134, 135

to encourage safe conduct. Just as this Court recognized over 100 years ago, there is no good reason to excuse a "railroad company from adopting such other measures as safety and common prudence dictate." *Ives, supra.* Here, that failure cost a man his life.

CONCLUSION

It would indeed be a bitter irony if a regulation enacted to enhance safety and improve the level of protection at railroad grade crossings would become the source of the total abrogation of the railroads' responsibility for safety at those crossings. If we accept the railroad's argument, we turn our back on reality and risk life and limb, while we await a taxpayer's solution to a problem that has been the railroads' responsibility for over a century.

Respectfully submitted,

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